





## Legal Protection of Traditional Knowledge of Indigenous Peoples in Obtaining Economic Benefits, Human Rights Perspective

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### ABSTRACT

This research is intended to reveal that traditional knowledge as part of human rights, is the result of innovation and creation of indigenous peoples in terms of knowledge, art, and literature. Traditional knowledge as intellectual property of indigenous peoples is therefore an economic resource that can be utilised for the progress and welfare of indigenous peoples. The research method used is normative juridical with conceptual and statutory approaches. Government efforts in protecting traditional knowledge as intellectual property of indigenous peoples through legislation. Other efforts that can be made are through inventory or documentation of traditional knowledge in an area and can be done by publishing the traditional knowledge as widely as possible. The factor behind the traditional knowledge of indigenous peoples has not provided optimal economic benefits for the welfare of the indigenous peoples concerned is the perspective of the indigenous peoples themselves, namely prioritising the public interest, as well as the lack of knowledge to make traditional knowledge into commodities that provide economic benefits.

**Keywords:** Protection. Traditional Knowledge, Indigenous People, Human Rights

### ABSTRAK

Penelitian ini bertujuan untuk menunjukkan bahwa pengetahuan tradisional sebagai bagian dari hak asasi manusia merupakan hasil inovasi dan kreasi masyarakat adat dalam bentuk pengetahuan, seni, dan sastra. Oleh karena itu, pengetahuan tradisional sebagai kekayaan intelektual masyarakat adat merupakan sumber daya ekonomi yang dapat digunakan untuk kemajuan dan kesejahteraan masyarakat adat. Metode penelitian yang digunakan adalah normatif-hukum dengan pendekatan konseptual dan perundang-undangan. Pemerintah berupaya melindungi pengetahuan tradisional sebagai kekayaan intelektual masyarakat adat melalui peraturan perundang-undangan. Upaya lebih lanjut dapat dilakukan melalui inventarisasi atau pendokumentasian pengetahuan tradisional di suatu daerah dengan mempublikasikan pengetahuan tradisional tersebut seluas-luasnya. Alasan mengapa pengetahuan tradisional masyarakat adat belum memberikan manfaat ekonomi yang optimal bagi kesejahteraan masyarakat adat yang bersangkutan adalah karena pandangan masyarakat adat itu sendiri, yaitu pengutamaan kepentingan umum, serta kurangnya pengetahuan untuk mentransformasikan pengetahuan tradisional menjadi komoditas yang mendatangkan manfaat ekonomi.

**Kata kunci:** Perlindungan, Pengetahuan Tradisional, Masyarakat Adat, Hak Asasi Manusia.



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## 1. Introduction

As an archipelago, Indonesia has a variety of tribes with a variety of customs, arts and cultures that have great potential in terms of traditional knowledge. This extraordinary cultural potential is essentially the communal rights of indigenous peoples, and at the same time is a national asset that must be protected and preserved by the state because it has a very high history value, cultural and philosophical value, and also has

a very high economic value so that it can benefit the community. The knowledge obtained by the community in interpreting the needs of nature and the environment and the knowledge obtained by the community as a result of ecological, social and cultural interactions is called traditional knowledge.<sup>1</sup>

Generally speaking, literary, artistic, or scientific creations that are the outcome of thought and have been transmitted from one generation to the next can be categorized as traditional knowledge. A common classification of traditional knowledge is that it represents traditional culture and includes traditional knowledge on medicine, plant genetic resources, crafts, and other topics.

It is very important to provide legal protection to traditional knowledge because traditional knowledge is the identity of the customary law society as its owner. Besides, there are some reasons to maintain traditional knowledge. One is the preservation of ancient knowledge and culture. Moreover, the purpose of protecting traditional knowledge is to protect the economic and moral rights of the holders of traditional knowledge and to prevent the unauthorized use of such knowledge. This is because conventional knowledge has economic value for developing countries and is one of the resources that the poor trust.<sup>2</sup> Besides, traditional knowledge has cultural and social value, which is another reason to protect it. The misuse of traditional knowledge for significant financial gain is another reason to protect it.<sup>3</sup>

The purpose of this paper is to explain how important it is to preserve the law of traditional knowledge of the people of customary law in order to gain financial gain and to provide an understanding of how to assess the standards that apply taking into account the need to protect the rights of people of indigenous law. In the context of human rights, this article provides some policy and regulatory advice to fulfil public economic rights, communal rights, and cultural rights.

Based on this background, the objective of the research is to answer the following questions: (1) An effort to protect traditional knowledge as a human right is carried out under customary law; (2) A common law society does not obtain an optimal financial benefit from the component of conventional knowledge.

## 2. Method

Normative law research is used as a research method. This evaluative thinking method aims to identify and determine which law is better. The type of data used consists of primary and secondary legal materials. Copyright laws, patent rights, and cultural rights are primary legal material, and books and journals are secondary law materials. Data analysis performed using qualitative juris.<sup>4</sup>

## 3. Discussion

Traditional knowledge is knowledge possessed or mastered by a particular community, community, or tribe for a long time and continues to evolve as the environment changes. Traditional knowledge also includes folklore expressions, which have existed since hundreds, maybe even thousands of years ago, in various forms. Using the traditional wealth of Indonesia is very profitable.

### 1. *The Protection of Traditional Knowledge as a Right of the Commonwealth of Aboriginal Law.*

In a customary law society, intellectual property is a local identity and identity. Intellectual property also has cultural values that are unique to each society. Traditional knowledge, which is one of the Communal Intellectual Property Rights, indicates that communal principles develop and emerge in society, ownership and preservation are communal in nature, and indicate the identity and culture of a particular community. Therefore, communal intellectual property is not personal, but inherent in society. Because it's called a communal right. Since it is not based on the concept of "first come first serve" used in the registration of individual property rights in general, the protection of traditional knowledge communities of customary law

<sup>1</sup> Jawahir Thontowi, Perlindungan dan Pengakuan Masyarakat Adat dan Tantangannya dalam Hukum Indonesia, *Jurnal Hukum Ius Quia Iustum*, 20(1), 2013, hal. 21–36.

<sup>2</sup> I Nyoman Nurjaya, Adat Community Lands Right as Defined within the State Agrarian Law of Indonesia: Is It a Genuine or Pseudo-Legal Recognition? *Jurnal Ius*, 2(6), 2014, Hal. 414.

<sup>3</sup> Marthen B Salinding, Prinsip Hukum Pertambangan Mineral dan Batubara yang Berpihak kepada Masyarakat Hukum Adat. *Jurnal Konstitusi*, 16(1), 2019, hal. 148–169. <https://doi.org/10.31078/JK1618>

<sup>4</sup> Depri Liber Sonata, Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum. *Fiat Justitia: Jurnal Ilmu Hukum*, 8(1), 2016, hal. 43

has more value. The values of traditional knowledge as the intellectual property of a society include cultural and moral values as well as economic values. The indigenous legal community of the village can generate income from this economic value.

Traditional knowledge belongs to every community of customary law society as an inheritance of communal descent. Traditional knowledge of indigenous law communities is an intellectual resource that is owned by the community of Indigenous Law communities. In an ideal village, the management of traditional knowledge of the common law community can benefit the community. If the village's customary law society can master traditional knowledge well, it will yield financial gains.

The abundance of the use of traditional knowledge by parties that do not belong to the communities of customary law for commercial purposes. In this case, indigenous people seek refuge. Mastering traditional knowledge for scientific and commercial interests increased as a result of the decline in natural resources. Several research and pharmaceutical companies have patented and claimed ownership of traditional medicine plants that have been used by indigenous peoples from generation to generation. However, in many cases, such companies do not recognize the ownership of traditional knowledge by indigenous peoples and do not provide a fair distribution of the economic, social, and medical benefits obtained from the use of knowledge<sup>5</sup>

Traditional knowledge belongs to every community of customary law society as an inheritance of communal descent. Traditional knowledge of indigenous law communities is an intellectual resource that is owned by indigeno-law communities. Valuable assets, traditional knowledge, can boost the economy of the village's customary law society. In an ideal village, the management of traditional knowledge of the common law community can benefit the community. If the village's customary law society can master traditional knowledge well, it will yield financial gains.<sup>5</sup>

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From the perspective of Human Rights, Article 18B paragraph (2) and Article 28I paragraph (3) of UUD 1945 explicitly recognize traditional knowledge as a traditional right and cultural identity of indigenous peoples as a constitutional right. (HAM). Conventional recognition as human rights in a common law society means that the right is granted to the rightholder and the state is responsible for providing legal protection.<sup>7</sup>

The United Nations (United Nations) Declaration on the Rights of Indigenous Peoples, also known as the United Nationen Erklärung über die Rechte der Indigenen Gesellschaften, regulates the recognition and protection of traditional knowledge as part of human rights. Article 11 (1) UNDRIP governs the right of indigenous peoples to practise and revitalize traditional knowledge.

Traditional fabric is one type of traditional knowledge of a particular legal society. Traditional Toraja fabric motifs are a pride for the Toraje community wherever they are. In customary events always use customary clothes made of fabric with Toraja engraved motifs. Toraja's customary fabrics have a high economic value because they are highly underestimated by all layers of the toraja society, including those under surveillance. The fabric industry in Toraja is still very traditional and has become one of the sources of income for the indigenous people in Toroja. But now weaving with Toraja engraving motifs has been massively produced in Java especially in Jepara. People ordered Toraja motif carvings to Jepara Central Java.<sup>8</sup>

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<sup>5</sup> Bakti, dan M. Saleh. Sjafei, Paradigma Penerapan Prinsip Pembangunan Berkelanjutan Di Indonesia. *Syah Kuala Law Journal*, 4(2), 2010, 173–184. <https://doi.org/10.24815/SKLJ.V4I2.17634>

<sup>5</sup> Fadri Alihar, Kebijakan Pengelolaan Pulau-Pulau Terluar Ditinjau Dari Aspek Kependudukan. *Jurnal Kebijakan Sosial Ekonomi Kelautan Dan Perikanan*, 8(1), 39, 2018, <https://doi.org/10.15578/jksekp.v8i1.6487>

<sup>6</sup> Roihanah, Penegakan Hukum Di Indonesia: Sebuah Harapan dan Kenyataan. *Justicia Islamica*, 12(1), 2015. <https://doi.org/10.21154/JUSTICIA.V12I1.258>

<sup>7</sup> Jawahir Thontowi, Op.Cit, hal. 30

<sup>8</sup> I Nyoman Nurjaya, Op.Cit, hal. 416

In this case, the traditional rights of the Toraja community, such as the fabric of motifs of Toraja engravings, are protected by law as part of human rights. The economic rights of the craftsman's community were lost when the Toraja motif was weaved in the district. Although traditional knowledge has economic rights, it also reflects the personality of its owners' societies. Every engraving used as a motive in Toraja fabric has a philosophical meaning. In the same way, its usage is adapted to the type of ritual event performed. Therefore, the state should provide legal protection to the traditional knowledge of indigenous law, so that individuals who do not have the right arbitrarily take the financial advantage of this knowledge.<sup>9</sup>

Protection is any attempt to protect traditional knowledge against unlawful and inconsistent use. The protection of this traditional knowledge is crucial, for at least three reasons: (1) the potential economic benefits derived from the use of traditional knowledge, (2) justice in the world trade system, and (3) the need to protect the rights of local people. There are several reasons for the need to develop the protection of traditional knowledge, among which are the consideration of justice, conservation, preservation of cultural and traditional practices, prevention of deprivation by the parties who do not have the right to the components of the traditional knowledge and the development of the use of the interests of traditional know-how. The protection of traditional knowledge plays a positive role in supporting the community in preserving its traditions.

There are two ways to provide legal protection over conventional knowledge. First, in the short term, conventional knowledge must be protected through a system of inventory and documentation of conventional know-how. This system must not only provide information but can also serve as a tool of legal proof. Basically, documentation can be done in a variety of ways, such as through writing, photographs, or special notes made by the government; however, the best is a documentation model that takes into account accessibility aspects. Documentation in digital form using databases is considered a fairly effective model.

Secondly, the government must promptly pass legislation to protect traditional knowledge in the medium and long term. I believe that these two approaches are the best to solve the problem of traditional knowledge that exists in Indonesia. Since it has to be accompanied by a verification process to prevent later disputes and controversies, documenting traditional knowledge does take a lot of time and cost. The central government can reduce the cost of documentation if the central government and the local government cooperate with Indonesian media companies that actively publish the unique traditions of Indonesia that are considered traditional knowledge.

In addition to the media, to ease the cost of documenting this traditional knowledge, the government can also involve national private companies whose products are largely based on the traditional knowledge of Indonesia. In addition, the Government can involve the national and international foundations in this documentation project, because these foundations have long published Indonesian traditional knowledge independently.

Society itself is an obstacle to providing HKI protection against conventional knowledge. This is due to the fact that many people continue to regard HKI as a "public right" that has a social function, because many people do not mind if their products are replicated by others. One of the issues to consider is the differences of opinion about the basic concepts and elements of ownership of Traditional Knowledge between Western and local communities.

The role of the State in realizing the objectives of the state of Indonesia is mentioned in the Fourth Opening of the Basic Law of 1945 as follows: 1. The State protects the entire people of Indonesia and the entire bloodshed of Indonesia; 2. The State has the right to guarantee social justice to all its citizens; 3. the State is sovereign on the basis of nationality and representation; and 4. The State is founded by the One God on the foundation of just and civilized humanity.

Given that HKI's approach to protecting traditional knowledge is ineffective, the government is currently developing sui generis laws to protect traditional knowledge. The bill on traditional knowledge and traditional cultural expression is one of them.

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<sup>9</sup> Yahya Ahamad Zein, Politik Hukum Pengelolaan Wilayah Perbatasan Berbasis Pemenuhan Hak Konstitusional Warga Negara. *Jurnal Hukum Ius Quia Iustum*, 23(1), 2016, 97–122. <https://doi.org/10.20885/IUSTUM.VOL23.ISS1.ART6>

2. *Factors rooted in traditional knowledge have not been optimally utilized as a financial resource for the community of customary law.*

Knowledge of traditional works is defined as knowledge transmitted from generation to generation, mostly in unwritten form. Traditional knowledge of indigenous peoples is inclusive, which means all parties can use it for free. If traditional knowledge continues to be developed and protected legally, it will have a high monetary value and can stimulate the economic growth of indigenous peoples. The economy relies on traditional intellectual property rights. The economic progress of a nation can be seen from how much HKI it has. This means that the Indonesian government must preserve traditional knowledge so that it is not abused by anyone other than indigenous peoples.

In HKI there are two special rights: economic right and moral right. (moral right). Regulations that have not fully supported the implementation of traditional knowledge become major obstacles so that traditional knowledge protection cannot be exploited optimally, the lack of public awareness to register the results of works, the characteristics of traditional knowing that are generally communal, and a lack of data documentation. The right to gain gain from intellectual property is defined as an economic right. This gain can be a financial gain derived from the use of one's own intellectual property rights or from the usage of the intellectual property rights by another party with a license. This is due to the possibility that HKI will be the subject of trade in the business world. Economic rights are transferable. While the moral right is the right to protect the personal interests or reputation of the inventor or creator.

The protection and exploitation of intellectual property of traditional knowledge and traditional cultural expression (HKI Protection and Exploitation Act) in Indonesia faces many problems, including the lack of public awareness of the concept of HKI protection, the high costs, and the long time taken by the bureaucracy to enact the law. If the state implements free regulation to recognize all traditional Indonesian knowledge, the customary law community will gain financial advantage and recognition of national and international law.

The economic dimension of sharing profits over the use of broad traditional knowledge. Traditional knowledge is used as a basis for economic analysis that can be profitable. The economic benefits are not so great if the owners do not use their own economic resources. If traditional knowledge is combined with a small amount of new innovations, the economic benefits will only be felt by the members of the HKI. As the original owner, the customary law society must go through certain procedures and be burdened with high costs if it wants to reuse its traditional knowledge.

A few factors that contribute to the hukum adat community's inability to reap the economic benefits of this traditional knowledge are the community's tendency to prioritize collective interests over individual ones, the high cost of producing intellectual property, the difficulty of producing products that are too complex and expensive, and the lack of organizations that oversee and facilitate the process of turning intellectual property into products.

The indigenous society as the owner of the knowledge of the collection does not earn a fair profit on its usefulness. Traditional knowledge disputes are alternatives that can be resolved, even if it takes longer to resolve in Indonesia. These individual and capitalist tendencies are not entirely contrary to members of indigenous communities.

The general public is more likely to be upset if their rights are violated and their freedoms are restricted without compromising their way of life. For the benefit of other organizations that utilize traditional knowledge outside of the general public, the members of that knowledge do not necessarily need to be made of material resources (money), but may also be utilized through: 1) Reducing the Human Resources of indigenous peoples through skills training and education to preserve their existence; 2) Properly serving technology to the Traditional Knowledge belonging to the Indigenous Peoples; 3) Crediting technology resources in enhancing the capacity of the traditional Knowledge; and 4) Developing a technology consortium between the central government, the local government, NGOs and indigenous communities owned by the traditional knowledge.

The distribution of the benefits can be directed to indigenous peoples through the customs institutions that cover them. The reason for this sharing of benefits is that indigenous peoples have been making use and preservation of Traditional Knowledge continuously and downward. Traditional knowledge that has continued downward is an intellectual property that indigenous peoples possess and are entitled to. The distribution of

benefits between indigenous peoples and those who will use and/or develop this Traditional Knowledge must be promptly established by a Government Regulation as an enforcement regulation of the Cultural Promotion Act. The Government regulation on such distribution is aimed at ensuring that the traditional Knowledge of indigeno-peoples has legal force.

As an Indonesian island state, it has a rich artistic and cultural diversity. It is in line with ethnic, tribal and religious diversity as a whole, which is a national potential that needs to be protected. Such artistic and cultural wealth is one of the sources of intellectual work which can and should be protected by law. That wealth is not solely for art and culture itself, but can be used to enhance the capabilities in the fields of trade and industry involving its creators. Thus, the protected cultural and artistic wealth can enhance the well-being not only of its creators, but also of the nation and country. Indonesia, as a country rich in culture, especially traditional arts, must protect traditional knowledge that exists within the territory of the United States of the Republic of Indonesia from the threat of recognition by other States or exploitation by citizens of other States. For Indonesian society in general, traditional knowledge and cultural expression are an integral part of the social life of the society concerned.

In the cultural dimension, Indonesian society has a more collective characteristic than itself. That's why, many of the traditional findings are described as the work of the crowd, not of the individual. Kecak dance, or legong dance, which was born in Bali, for example, until now there is no record of anyone who claimed to be the inventor or creator. The public recognizes the dance as a legacy from ancient times. The protection provided by the current legislative regulations in the field of HKI is perceived to be highly individual, not being able to provide adequate protection against the ownership of the intellectual property of traditional technological knowledge generally owned by groups in society.

The most important aspect to be aware of in understanding the problems faced by indigenous peoples is the fact of their diversity. This diversity can be seen in terms of culture, religion and/or beliefs, as well as economic and social organization. In relation to the environmental problems, some groups position them as idealized groups in relation to nature by emphasizing the reality of the spiritual relationship of indigenous societies with nature. In Indonesia, the existence of indigenous societies is a wealth of nations with a variety of science that they have developed.<sup>10</sup>

#### 4. Conclusion

First, for the short term, traditional knowledge must be protected by a system of inventory/documentation of traditional knowledge that not only provides an informative function but can also be used as a function of legal proof. Basically, documentation can be done in a variety of ways, either through photographs, writing, or special records made by the government. Moreover, a model of documentation in digital form using databases is considered quite an effective model. Secondly, for the medium and long term, it is appropriate for the government to promptly issue legislation specifically protecting traditional knowledge. If only, these two ways are the right methods in dealing with the problems of traditional knowledge that exist in Indonesia.<sup>11</sup>

Some of the factors that have caused customary society to not be able to enjoy the economic benefits of such traditional knowledge are the nature of communal indigenous society will always give priority to the common interest over the personal interest, the cost of producing intellectual property is very high, permits in the manufacture of products are quite difficult, competition is high enough, the absence of institutions that facilitate and control that such property is made a product on the market. Next is the lack of regulation that implicitly regulates the protection of traditional knowledge.

Current national and international legal instruments have not specifically regulated Traditional Knowledge. Therefore, the Government should make every effort to protect Traditional Knowledge. Proposed to revise the Trips Agreement which specifically regulates the issue so that Traditional Knowledge as a right

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<sup>10</sup> David Pester, *Finding legal information: a guide to print and electronic sources*, Material type: TextPublication details: U.S.A : Chandos Publishing, 2003, hal.283

<sup>11</sup> El Hinnawi, Essam · Hashmi, Manzur H.. (1987). *The state of the environment*. London: Butterworths, 1987, hal.182.

of indigenous law communities can be protected from exploitation by entitled parties. Government and parliament must make legislation specifically governing traditional knowledge, in order to avoid divarietas of regulation on such matters. Governments should urge the countries that are members of the WIPO, to promptly revise the TRIPs Agreement to strictly regulate the protection of traditional knowledge.

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